UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOAN M. HALL-GROVER,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-239-P-C***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the issue whether substantial evidence supports the commissioner's determination that the plaintiff, who alleges that she is disabled as a result of right shoulder impingement, Raynaud's Syndrome, lower-extremity neuropathy and diarrhea, is capable of making a successful vocational adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be vacated and the case remanded for further proceedings.

---

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on April 28, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

Pursuant to the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff retained the residual functional capacity ("RFC") to perform sedentary work, including frequently lifting ten pounds, occasionally lifting twenty pounds, standing and walking for two hours during an eight-hour workday and sitting for six hours during an eight-hour workday, but would be unable to perform any activities requiring repetitive reaching with her right upper extremity, would need to avoid all hazards including machinery and heights, would require a position that allowed access to bathroom facilities during the workday as a result of problems with diarrhea and would require a position that demanded no more than simple, repetitive tasks because of constant distraction from pain, Finding 7, Record at 23; that using Rule 201.27 of Table 1, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") as a framework for decision-making, and considering the plaintiff's age ("younger individual"), education (high school or high-school equivalent) and RFC, there were a significant number of jobs in the national economy she could perform, including security monitor (with thirty-five positions statewide and 87,000 nationwide) and charge-account clerk (with 125 positions statewide and 59,000 nationwide), Findings 9-13, *id*.; and that she therefore was not under a disability at any time through the date of decision, Finding 14, *id*. at 24.[2] The Appeals Council declined to review the decision, *id*. at 7-9, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981; 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of*

[2] Inasmuch as the plaintiff had acquired sufficient quarters of coverage to remain insured, for purposes of SSD, through *(continued on next page)*

Health & Human Servs., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff contends that the administrative law judge erred in (i) relying at Step 5 on two jobs (security monitor and charge-account clerk) that cannot be performed with the RFC limitations found and (ii) mishandling the RFC opinion of treating physician James Donahue, D.O. *See generally* Itemized Statement of Errors Pursuant to Local Rule 16.3 Submitted by Plaintiff ("Statement of Errors") (Docket No. 5). I agree.

I. Discussion

A. Vocational-Expert Testimony

At the plaintiff's hearing, vocational expert Howard Steinberg testified that a person who, *inter alia*, "should have access to bathroom facilities throughout the day" could perform the jobs of security monitor, which he identified as corresponding with section 379.367-010 of the Dictionary of Occupational Titles

---

the date of decision, *see* Finding 1, Record at 22, there was no need for separate SSD and SSI analyses.

(U.S. Dep't of Labor, 4th ed. rev. 1991) ("DOT"), and charge-account clerk, which he identified as corresponding with section 205.367-015 of the DOT. *See* Record at 47-48.[3]

The plaintiff testified at hearing that she had been having severe pain in her abdomen along with vomiting and diarrhea and that, "on a good day," she would need to use the bathroom about every forty-five minutes as a result. *Id*. at 37. The DOT describes the job of security monitor (which it terms "surveillance-system monitor") as follows:

> Monitors premises of public transportation terminals to detect crimes or disturbances, using closed circuit television monitors, and notifies authorities by telephone of need for corrective action: Observes television screens that transmit in sequence views of transportation facility sites. Pushes hold button to maintain surveillance of location where incident is developing, and telephones police or other designated agency to notify authorities of location of disruptive activity. Adjusts monitor controls when required to improve reception, and notifies repair service of equipment malfunctions.

DOT § 379.367-010. When, at hearing, the plaintiff's counsel pressed Steinberg as to whether a person who must go to the bathroom on an as-needed basis (as opposed to waiting) could do this job, the following colloquy between Steinberg, the administrative law judge and the plaintiff's counsel ensued:

> A [Steinberg] The way that the question was presented to me was access to the bathroom and perhaps you wanted to get a little more specific with the amount of time an individual might need to be away from the work station during the day. I can answer that question for you.
>
> Q [counsel] Well, I interpreted bathroom access to mean that she is able to use the bathroom when she needs to basically rather then [sic] waiting.
>
> ALJ: I think from what I've heard, access to the bathroom facilities throughout the workday, so that would certainly indicate as needed. But the question is going to become documentation for that is needed. You've heard the testimony regarding that. In order to quantify this as a hypothetical let's, let me ask you to then assume that I would find

[3] There is no section 205.367-015 of the DOT. The plaintiff identified this job as corresponding to DOT § 205.367-014, *see* Statement of Errors at 2-3; DOT § 205.367-014 (charge-account clerk), and at oral argument counsel for the commissioner concurred.

> the testimony regarding the frequency of use of bathroom facilities to be credible, would that, such an individual then be able to perform either of the jobs you've identified?
>
> VE: The claimant testified, according to my notes, that on a good day she needed to use the bathroom every 45 minutes, and I think it's a reasonable assumption that if she had to be away from her work place, work station in either of the two jobs, every 45 minutes on a good day, more frequently on a bad day, that these jobs would not be able to be performed without significant accommodations.

Record at 49-50.

In the body of his decision, the administrative law judge discredited the plaintiff's testimony regarding her frequency of bathroom usage, noting that although she complained in January 2002 of frequency of ten to fifteen bowel movements a day, she had been taking a binding agent with some improvement, and Dr. Donahue's progress note of September 2002 did not reflect complaints of diarrhea at that level of frequency. *See id*. at 22, 306, 450. However, he made no alternative finding concerning the frequency of her need to use the bathroom. *See id*. at 22.

It is bedrock Social Security law that the responses of a vocational expert are relevant only to the extent offered in response to hypotheticals that correspond to medical evidence of record. *Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982). The vocational expert never answered the critical question as clarified: Could a person who could not wait until a scheduled break to use bathroom facilities do the security-monitor and charge-account clerk jobs? Moreover, the administrative law judge never made an affirmative, alternative finding as to how much time the plaintiff would need to be away from her work station for bathroom breaks. Without these clarifications, Steinberg's hearing testimony does not meet the burden of proving that a person who must have access to bathroom facilities throughout the workday as a result of problems with diarrhea can perform the jobs of security monitor and charge-account clerk.

The plaintiff next points out, correctly, that the demands of the security-monitor and charge-account clerk jobs as described in the DOT are seemingly inconsistent with a limitation to simple repetitive work. *See* Statement of Errors at 4-5. Both jobs have a General Educational Development ("GED") reasoning level of 3, which requires a worker to "[a]pply commonsense understanding to carry out instructions furnished in written, oral, or diagrammatic form" and to "[d]eal with problems involving several concrete variables in or from standardized situations." DOT §§ 205.367-014, 379.367-010. By contrast, a job with a GED reasoning level of 1 requires a worker to "[a]pply commonsense understanding to carry out simple one- or two-step instructions" and to "[d]eal with standardized situations with occasional or no variables in or from these situations encountered on the job," while a job with a GED reasoning level of 2 requires a worker to "[a]pply commonsense understanding to carry out detailed but uninvolved written or oral instructions" and to "[d]eal with problems involving a few concrete variables in or from standardized situations." Appendix C, § III to DOT.

Steinberg testified at hearing that a limitation to simple, repetitive tasks was consistent with both jobs he identified inasmuch as both had SVPs, or Specific Vocational Preparation ratings, of 2, "which typically are the level of jobs that we look at when there are issues of a need for simple, repetitive tasks." Record at 49. Nonetheless, SVP ratings speak to the issue of the level of vocational preparation necessary to perform the job, not directly to the issue of a job's simplicity, which appears to be more squarely addressed by the GED ratings. *See* Appendix C, § II to DOT ("Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation."); *see also, e.g., Allen v. Barnhart*, 90 Soc. Sec. Rep. Serv. 476, 486 (N.D. Cal. 2003) (noting that jobs with GED reasoning level of 2, which presupposes ability to follow detailed and involved instructions, exceeded administrative law

judge's limitation to simple, routine tasks); *Walton v. Chater*, No. 94 C 1484, 1995 WL 579535, at *4 (N.D. Ill. Sept. 25, 1995) ("A job like cashiering, which requires the manipulation of written, oral, or diagrammatic instructions and the solving of problems involving concrete variables, does not jibe with the abilities of a person who can only perform work which needs little or no judgment to do simple duties. The ALJ's finding that the Claimant can perform unskilled work does not establish that the Claimant can operate at level three reasoning development.") (footnote omitted).

At the very least, as the plaintiff suggests, *see* Statement of Errors at 6, the administrative law judge should have queried Steinberg as to whether his description of the two jobs in issue varied from that of the DOT and acknowledged and resolved any inconsistencies, *see* Social Security Ruling 00-4p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) ("SSR 00-4p"), at 243 ("[B]efore relying on VE or VS evidence to support a disability determination or decision, our adjudicators must . . . [i]dentify and obtain a reasonable explanation for any conflicts between occupational evidence provided by VEs or VSs and information in the [DOT]" and "explain in the determination or decision how any conflict that has been identified was resolved.").

On this ground, as well, reversible error was committed.

The plaintiff finally asserts that the job of charge-account clerk, as described in the DOT, appears to be inconsistent with the restriction of no repetitive reaching with the right (dominant) upper extremity. *See* Statement of Errors at 5-6. This point also is well-taken. According to the DOT, the charge-account clerk job requires frequent reaching. *See* DOT § 205.367-014. The administrative law judge failed to query Steinberg concerning any inconsistency between his testimony and the DOT description or to acknowledge and resolve this seeming conflict in accordance with SSR 00-4p.

As a result of these errors, the administrative law judge's Step 5 finding is unsupported by substantial evidence, necessitating remand.

B. Treatment of Treating Physician

In her second and final point of error, the plaintiff asserts that the administrative law judge erred in his handling of the RFC opinion of treating physician Dr. Donahue. *See* Statement of Errors at 6-7; *see also* Record at 477-80 (Donahue RFC assessment). To the extent the plaintiff suggests that an RFC opinion might be entitled to controlling weight, I disagree. Determinations regarding RFC and disability are reserved to the commissioner; accordingly, no "special significance" is accorded an opinion even from a treating source as to these matters. *See* 20 C.F.R. §§ 404.1527(e)(1)-(3), 416.927(e)(1)-(3). Nonetheless, regardless of the subject matter as to which a treating physician's opinion is offered, the commissioner must "always give good reasons in [his] notice of determination or decision for the weight we give your treating source's opinion." *Id*. §§ 404.1527(d)(2), 416.927(d)(2); *see also, e.g.*, Social Security Ruling 96-8p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) ("SSR 96-8p"), at 150 ("The RFC assessment must always consider and address medical source opinions. If the RFC assessment conflicts with an opinion from a medical source, the adjudicator must explain why the opinion was not adopted.").

In rejecting Dr. Donahue's RFC, the administrative law judge stated:

> While Dr. Donahue, the claimant's treating source, has assessed much greater limitations including the opinion of total disability, I do not give significant weight to this assessment. Dr. Donahue's opinion that the claimant is disabled is an issue reserved to the Commissioner (SSR 96-5p) and he has failed to submit reports of clinical findings to support his conclusions.

Record at 21. Neither of these reasons qualifies as a "good" one for rejection of the Donahue RFC opinion. The fact that an issue is reserved to the commissioner is not, in itself, an explanation for the weight

accorded to the opinion. And, as the plaintiff points out, *see* Statement of Errors at 6, it simply is not true that Dr. Donahue failed to submit reports of clinical findings. He in fact submitted many pages of handwritten progress notes. *See, e.g.*, Record at 230-76. To the extent the administrative law judge meant to suggest that those notes do not support Dr. Donahue's RFC, he failed to articulate how or why. *See id.* at 21. Even granting that there may well be good reason for discounting Dr. Donahue's RFC, the court cannot, in the first instance, dredge up such good reasons for the commissioner. *See, e.g.*, *Rodriguez*, 647 F.2d at 222 ("The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts.").

Inasmuch as I have already found ample grounds for reversal and remand, I need not determine whether the treating-physician error, standing alone, would have justified remand. Suffice it to say that on remand this error, too, must be addressed.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the case **REMANDED** for further proceedings not inconsistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 30th day of April, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

JOAN M HALL-GROVER represented by **DANIEL W. EMERY**
36 YARMOUTH CROSSING DR
P.O. BOX 670
YARMOUTH, ME 04096
(207) 846-0989
Email: danemery@maine.rr.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

SOCIAL SECURITY ADMINISTRATION COMMISSIONER represented by **ESKUNDER BOYD**
SOCIAL SECURITY ADMINISTRATION
OFFICE OF GENERAL COUNSEL, REGION I
625 J.F.K. FEDERAL BUILDING
BOSTON, MA 02203
617/565-4277
Email: eskunder.boyd@ssa.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

THOMAS D. RAMSEY
JFK FEDERAL BUILDING
ROOM 625
BOSTON, MA 02203-0002
617/565-4277
Email: thomas.ramsey@ssa.gov
ATTORNEY TO BE NOTICED